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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 235

EARL B. SPURR,

Petitioner,

vs.

STASIA SPURR

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA AND SUPPORTING BRIEF.

GEO. E. ALLEN,
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FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

To the Honorable Supreme Court of the United States:

Your petitioner, Earl B. Spurr, respectfully prays for a review on a writ of certiorari of a decision of the Supreme Court of Appeals of Virginia, involved in the decree of the said court, entered on the 25th day of April, 1945, in the appeal therein pending, wherein your petitioner was Appellant and the above named Stasia Spurr was Appellee.

A transcript of the record below, together with the decree appealed from, has been filed with this petition in accordance with the rules of this Court.

Federal Jurisdiction

The jurisdiction of this Court is founded on Article 4, Section 1, of the Constitution of the United States, which provides that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." The courts of the State of Virginia, both the trial court and the Supreme Court of Appeals, denied petitioner his constitutional rights under this section by refusing to give full faith and credit to the judicial proceedings of the State of North Carolina, in which an absolute divorce was granted to petitioner.

Statement of the Matter Involved

(a) *The Cause of Action*

Respondent, Stasia Spurr, sued petitioner in the Circuit Court of the City of Norfolk, Virginia, for a divorce, and on March 3rd, 1941, obtained a divorce *a mensa et thoro*, that is a mere bill of separation, leaving the parties husband and wife, though separated in their persons and property. No further proceedings were had in the case leading to an absolute divorce. On November 18, 1942, petitioner had occasion for business reasons, among others, to move from the State of Virginia to the State of North Carolina. He established his domicile there in good faith and has continued to live there up to the present time, with no thought of returning to Virginia. In February, 1944, in strict compliance with the statutes of North Carolina on the subject, he obtained an absolute divorce under the North Carolina statute providing that "marriages may be dis-

solved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for two years, and the plaintiff in the suit for divorce has resided in the State for a period of six months." Thereafter he married Ruth Spurr and is now living with her in the State of North Carolina.

(b) *Proceedings*

In May, 1944, it was brought to the attention of the Circuit Court of the City of Norfolk, Virginia, by appropriate proceedings, that a divorce had been granted to petitioner in North Carolina, and the court was asked to give full faith and credit to the decree of the North Carolina court. This the court refused and entered a decree "that the divorce claimed to have been procured by the defendant, Earl B. Spurr in the State of North Carolina * * * is of no force or effect in the State of Virginia, and that the said plaintiff, Stasia Spurr, is still the lawful wife of the said Earl B. Spurr in the State of Virginia." This decree of the trial court was affirmed by the Supreme Court of Appeals of Virginia on the 25th day of April, 1945.

(c) *Question of law involved*

Did the Circuit Court of the City of Norfolk, Virginia, and the Supreme Court of Appeals of Virginia, give to the decree of the North Carolina court that full faith and credit which it was their duty to do under the full faith and credit clause, Const. Art. 4, Sec. 1?

Reason Relied On for the Allowance of Writ

The special and important reason for review of the decision of the Circuit Court of the City of Norfolk, Virginia,

and the decision of the Supreme Court of Appeals of Virginia affirming it, is:

Said courts have decided a Federal question of substance in a way probably not in accord with the applicable decisions of this Court. See *Williams* v. *North Carolina,* 317 U. S. 287, 63 Sup. Ct. 207, decided December 21, 1942; *Williams* v. *State of North Carolina,* 65 Sup. Ct. 1092, decided May 21, 1945; *Esenwein* v. *Commonwealth of Pennsylvania,* 65 Sup. Ct. 1118, decided May 21, 1945.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be sued out of and under the seal of this Honorable Court, directed to the Supreme Court of Appeals of Virginia, commanding that court to certify and to send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record, and all of the proceedings in said case of *Spurr* v. *Spurr;* and that the said decree of the Supreme Court of Appeals of Virginia may be reviewed by this Honorable Court; that such further proceedings may be had as may be necessary to afford your petitioner complete relief; and that such other and further relief in the premises may be had as to this Honorable Court may seem right and just, and your petitioner will ever pray.

EARL B. SPURR,
By Counsel.

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SUPREME COURT OF THE UNITED STATES

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Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

No opinion was handed down by the court below. Its decree affirming the decree of the trial court was entered on the 25th day of April, 1945, and will be found on page 48 of the record.

II

Jurisdiction

1. The controversy involves the construction and application of Article 4, Section 1, of the Constitution of the United States.

2. The date of the decree to be reviewed was entered on the 25th day of April, 1945.

3. The case involves a divorce suit in which the Virginia courts failed to give full faith and credit, as required by the Constitution of the United States, to a divorce decree granted by the State of North Carolina.

III

Statement of the Case

Petitioner and Mrs. Stasia Spurr were married in Lynchburg on January 28, 1934. Two children were born to the marriage. In August, 1940, Stasia Spurr filed her bill of complaint against the petitioner in the Circuit Court of the City of Norfolk. Sundry proceedings were had leading to the granting of a divorce *a mensa et thoro* to Stasia Spurr from petitioner, Earl B. Spurr. In Virginia such a divorce leaves the parties husband and wife and merely separates them in their persons and property. No further proceedings were had leading to the granting of an absolute divorce. On November 18, 1942, petitioner, who is an employee of the Bureau of Internal Revenue of the Treasury Department of the United States Government, was sent by the Department to work in North Carolina, and moved his residence to Pelhan., in that State, where he has lived ever since, with no thought of returning to Virginia. After having become domiciled in the State of North Carolina and having lived there for the period of time required by the statutes of North Carolina in order

to give the North Carolina courts jurisdiction, he filed a suit in the Superior Court of Guilford County, North Carolina against his wife for a divorce. The suit was based upon the North Carolina statute which provides "marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for two years, and the plaintiff in the suit for divorce has resided in the State for a period of six months." Chap. 50-6 of the General Statutes of North Carolina. Plaintiff actually resided in the State of North Carolina for a period of twelve months before filing his suit for divorce and still resides there. Stasia Spurr being a non-resident of North Carolina, notice upon her was served in accordance with the North Carolina statutes providing for publication of notice in a newspaper. Chap. 1-588 of the General Statutes of North Carolina. At the February Term, 1944, of the Superior Court of Guilford County, petitioner was granted a divorce on the grounds of the two years separation from his wife, in accordance with the laws of the State of North Carolina. In subsequent proceedings in the case before the Circuit Court of the City of Norfolk, the granting of the divorce to petitioner by the North Carolina court was brought to the attention of the Circuit Court and it was asked to give full faith and credit to the decree. This the Circuit Court of the City of Norfolk refused, holding that the divorce procured by petitioner in North Carolina "is of no force or effect in the State of Virginia, and that the said plaintiff, Stasia Spurr, is still the lawful wife of the said Earl B. Spurr in the State of Virginia." In the meantime, petitioner had intermarried with Ruth Spurr, and had continued to live in the State of North Carolina. The decree of the Circuit Court of the City of Norfolk was affirmed

by the Supreme Court of Appeals of Virginia on the 25th day of April, 1945.

IV

Specification of Error

1. The Supreme Court of Appeals of Virginia erred in affirming the decree of the Circuit Court of the City of Norfolk, holding that the decree of the Superior Court of Guilford County, North Carolina, granting a divorce to your petitioner is of no force or effect in the State of Virginia.

V

Argument

The decree of the Supreme Court of Appeals of Virginia affirming the decree of the Circuit Court of the City of Norfolk involves an important question of constitutional law and is in conflict with the decisions of this court on the subject.

The Supreme Court of Appeals of Virginia, prior to the decree here complained of, decided in *McFarland* v. *McFarland*, 179 Va. 418, 19 S. E. (2d) 77, that the refusal to recognize such a decree of another state as the one here involved does not offend against the full faith and credit clause of the Federal Constitution, unless the suit in which the decree is entered is brought in the state of the matrimonial domicile of the parties against the consort who has left that state and gone to another. Since the decision in *McFarland* v. *MacFarland, supra*, this court has, in *Williams* v. *State of North Carolina*, 317 U. S. 287, 63 Sup. Ct. 209, decided December 21, 1942; *Williams* v. *State of North Carolina* decided May 21, 1945, 65 Sup. Ct. 1092, and *Esenwein* v. *Commonwealth of Pennsylvania*, decided May 21, 1945, 65 Sup. Ct. 1118, decided that full faith and credit must be given such decrees without regard to whether they were

rendered in the state of the matrimonial domicile of the parties or a state other than the matrimonial domicile. More over, these cases have laid down the doctrine unmistakably that full faith and credit must be given such decrees unless they can be impeached for fraud. And whenever it appears that such a decree has been entered in accordance with the laws of the foreign state, it is prima facie valid and must be given effect in every other state excepting in case of fraud, and the burden is upon those who allege fraud to establish it by satisfactory evidence. In the instant case, there is no mention in any of the testimony of any fraud having been practiced upon the court with reference to the question of domicile. The pleadings and the testimony on the subject, including the proceedings in the North Carolina court, show that petitioner moved to North Carolina in good faith and established his domicile there and that he has continued to live there, and is to this date living in North Carolina. It is apparent from a scrutiny of the proceedings that both the trial court and the Supreme Court of Appeals had in mind the doctrine laid down in the *McFarland* case which has been overruled by the two *Williams* cases from North Carolina and the *Pennsylvania* case cited above. The *McFarland* case actually held that a divorce granted in a state other than the state of the matrimonial domicile, to a party migrating to such other state, is not valid if granted upon a ground which would not be recognized in Virginia as a ground for a divorce. Mr. Justice Spratley, speaking for the court, concludes as follows:

> "All of the circumstances and the weight of reason and authority, we think, support our conclusion that the decree of the Superior Court of Currituck County, North Carolina, entered at its July term, 1940, so far as it attempts to substitute the law of North Carolina for that of Virginia, is inoperative and invalid in this State. In Virginia, Mrs. McFarland remains the lawful, wedded wife of James M. McFarland."

Before concluding this supporting brief, we think it proper to avert to the language of the decree of the Supreme Court of Appeals of Virginia to the effect that the court was of opinion that the record was insufficient "because it was not made up and certified in accordance with the requirements of the law of this State." At first glance it might appear that the petition for the appeal was rejected on that ground. However, the decree concludes that the effect of the refusal of the appeal was to affirm the decree of the lower court. The record which was certified contains everything essential to enable the court to pass upon the controlling question. There is no suggestion in any of the decrees or testimony that any fraud was proven in connection with the question of petitioner's domicile. It was conceded that he moved to North Carolina on the date alleged and that he lived there longer than necessary to establish his domicile for purposes of divorce, and that he is still living there. In view of all the circumstances, it is respectfully submitted that "the challenged judgment" will not satisfy the scrutiny of this Honorable court "that the reciprocal duty of respect owed" by the State of Virginia to the State of North Carolina has been properly discharged.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers in order that the petitioner may have the benefit of the constitutional provision involved, and that, upon the whole case, the circumstances justify the issuance of the writ in order that the ends of justice may be attained, and that to such an end a writ of certiorari should be granted, and this Honorable Court should review

the decision of the Supreme Court of Appeals of Virginia, and finally reverse it, either in whole or in part.

Respectfully submitted,

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SEP 4 1945
CHARLES ELMORE CROPLEY
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IN THE

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OCTOBER TERM, 1945

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EARL B. SPURR

v.

STASIA SPURR

BRIEF FOR STASIA SPURR OPPOSING GRANTING CERTIORARI

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IN THE

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No. 235

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BRIEF FOR STASIA SPURR OPPOSING GRANTING CERTIORARI

No Federal Question has been considered, nor decided, by the Supreme Court of Appeals of Virginia, so the Supreme Court of the United States should refuse certiorari.

This case was tried on evidence taken *"ore tenus"* (orally by the living voice) in the Circuit Court of the City of Norfolk, on November 4, 1944, and by decree of that date, expressly showing the evidence was *"ore tenus"*, decided in favor of Stasia Spurr. See printed record, pages 37 (bottom) and 38 (top); the decree as to this reading:

"This cause having duly matured upon process served upon the defendant in person, came on this day to be heard upon the bill, answer, general replication,

AND EVIDENCE TAKEN ORE TENUS after proper notice, and was argued by counsel." (Capitals added).

Under the law of Virginia, where an appeal is applied for, the oral evidence has to be put into the record by bill of exceptions or certificate of exceptions within sixty days after the decree or judgment, otherwise the record is so defective that the Supreme Court of Appeals will refuse an appeal, as was done in the present case.

In the present case, the *ore tenus* evidence was never put into tne record, Earl B. Spurr applied for appeal to the Supreme Court of Appeals of Virginia, and that court refused his appeal, wholly and solely because the record did not contain the *ore tenus* evidence, and was insufficient under the law of the *State of Virginia,* to be considered on appeal; and the appeal being refused, the effect was to leave the decree of the Circuit Court in force.

In refusing the appeal, and not considering at all any Federal Question, or any question save that the record did not conform to Virginia State law, the Supreme Court of Appeals entered a definite order April 25, 1945, reading (Printed record, p. 39):

"The petition of Earl B. Spurr for an appeal from and supersedeas to a decree entered by the Circuit Court of the City of Norfolk on the 4th day of November, 1944, in a certain chancery cause then therein depending wherein Stasia Spurr was plaintiff and the said petitioner was defendant, having been maturely considered and a transcript of the record of the decree

aforesaid seen and inspected, the court being of opinion that the *said record is insufficient because it was not made up and certified in accordance with the requirements of the law of this State, doth reject said petition and refuse said appeal and supersedeas,* the effect of which is to affirm the decree of the said circuit court." (Italics added).

As the Supreme Court of Appeals of Virginia based its order refusing appeal on a point of *State law,* it is obvious that the certiorari now asked should be refused, and we hesitate to cite authority for a matter so often decided. However, we will cite two recent cases decided by the Supreme Court of the United States.

In *Copperweld Steel Co.* v. *Industrial Commission of Ohio,* decided April 23, 1945, (U. S. Sup. Ct. Law Ed. Advance Opinions Vol. 89, p. 928, 930), it is said:

"In as much as we conclude that decision was grounded upon the view that the appellant had not pursued the remedy afforded by *state law* for the vindication of any constitutional right it claimed was violated, we must dismiss the appeal, and deny certiorari." (Italics added).

And in *Congress of Industrial Organizations v. McAdory,* decided June 11, 1945 (U. S. Sup. Ct. Law Ed. Advance Opinions, Vol. 89, p 1283, 1287), the opinion states:

"Since the State Supreme Court did not pass on the question now urged, and since it does not appear

to have been properly presented to that court for decision, we are without jurisdiction to consider it in the first instance here."

To doubly demonstrate that the decision of the Supreme Court of Appeals of Virginia in refusing the appeal was based purely on Virginia State Law, we have printed herewith at the end of this present brief, as part hereof, a copy of the brief which was filed for Stasia Spurr in that Court in opposition to granting an appeal in that Court.

We respectfully submit that certiorari should be refused.

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Attorney for Stasia Spurr.

IN THE
Supreme Court of Appeals of Virginia
AT RICHMOND

EARL B. SPURR
v.
STASIA SPURR

BRIEF IN OPPOSITION TO GRANTING APPEAL

The petition for appeal, page 1, says the final decree complained of was entered *March* 4, 1944; and if that were correct, it would be far too old a decree to appeal from under the four months statute; but that is wrong; the true date of the decree in question being November 4, 1944.

At this stage of the proceedings, it is unnecessary to inquire into the merits of the controversy, either as to facts or law, so we shall not take the time of the Court in demonstrating how correct was the decree, BECAUSE PETITIONER HAS BROUGHT TO THIS COURT AN INSUFFICIENT RECORD, A MERE DEAD SKELETON, WITH THE SUBSTANCE, HEART AND SOUL OMITTED.

This case was heard on Novemer 4, 1944, on evidence taken before the court *ore tenus,* as expressly shown by the decree of that date, and shown by the petition near bottom of page 3 in copying that decree, to-wit:

"This cause having duly matured upon process served upon the defendant in person, came on this day

to be heard upon the bill, answer, general replication, AND EVIDENCE TAKEN ORE TENUS after proper notice, and was argued by counsel." (Capitals added).

The sixty days for making the evidence part of the record having long since elapsed, petitioner now offers a record *with no evidence* (except some supposed depositions on his own behalf not recognized by the decree, and which may well have been ruled out); and not even pretending to show all the evidence.

This case, therefore, is controlled by a solid line of decisions showing that to award an appeal would be a mere improvident award and not legal.

In *Claud v. Pulley,* 169 Va. 467, in dismissing the appeal as improvidently awarded, this Court said:

"At the threshold of this case we are met with a motion to dismiss it from the docket because a large part of the evidence was taken *ore tenus* in open court before the judge, in chancery, and there is nothing in the form of a certificate or bill of exceptions, signed by him, identifying the evidence or making it a part of the record. That this must be done is made mandatory by section 6252 of the Code, as amended by Acts 1930, ch. 246, and section 6253 of the Code as amended by Acts 1934, ch. 90, and Rule XXIV of this court.

"The fololwing cases are controlling as to this point: *Nethers v. Nethers,* 160 Va. 335, 168 S. E. 428; *Ross Cutter and Silo Co. v. Rutherford,* 157 Va. 674, 685, 161 S. E. 898; *Lawrence & Son, Inc. v. Merkel,* 167 Va. 297, 189 S. E. 162.

"In the case of *Nethers v. Nethers,* supra, it was said: 'In *Ross Cutter and Silo Co. v. Rutherford,* 157 Va. 674, 161 S. E. 898, it was held that testimony introduced *ore tenus* before a chancery court is no more a part of the record than is evidence introduced in a common law case, unless it is reduced to writing and made a part of the record, either by decree duly entered or by crtificate signed by the judge earmarking and identifying it.'"

To the same effect is *Carper v. Nesbitt,* 182 Va. 710, and other authorities therein cited.

The record as presented being null and void, we submit that the appeal should be refused and that the order of refusal should distinctly state that the record does not comply with the requirements of *State* law, so that petitioner cannot claim that the Supreme Court of Appeals of Virginia has passed upon some Federal question.

Respectfully submitted,

JAS. G. MARTIN,

Counsel for Stasia Spurr

Copy mailed counsel for petitioner

March 8, 1945.